

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUL 27 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0082-PR
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
GERMAN SALAZAR MORALES,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20080585

Honorable Jane L. Eikleberry, Judge

REVIEW DENIED

The Law Offices of Lawrence Y. Gee, PLLC
By Lawrence Y. Gee

Tucson
Attorney for Petitioner

H O W A R D, Chief Judge.

¶1 Following a jury trial, petitioner German Morales was convicted of one count of driving under the influence of an intoxicant (DUI) and one count of aggravated DUI. The trial court sentenced him to time served for the DUI, and to twelve years' imprisonment for the aggravated DUI. On appeal, this court affirmed his conviction and

sentence for the aggravated DUI, but vacated his conviction and sentence for the DUI. *State v. Morales*, No. 2 CA-CR 2009-0156 (memorandum decision filed July 23, 2010).

¶2 Morales filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., which the trial court dismissed on January 24, 2012. On February 24, 2012, Morales filed a “motion for leave to amend in the alternative, request for review” (request for review), asserting Rule 32 counsel had been ineffective and requesting the appointment of new counsel, and asking for leave to amend his petition for post-conviction relief and leave to file a delayed petition for review.¹ On March 7, 2012, the trial court determined it would treat Morales’s request for review as a motion for rehearing pursuant to Rule 32.9(a), despite its untimely filing as such, and further concluded Morales was not entitled to relief on that motion. *See* Ariz. R. Crim. P. 32.9(a) (motion for rehearing must be filed “within fifteen days after the ruling of the court”).

¶3 Subsequently, in a March 23, 2012 ruling, the trial court reaffirmed its March 7 ruling, and again denied the request for an extension to file a petition for review. In a ruling dated April 4, 2012, the court further noted, “the deadline to file a Petition for Review of this Court’s denial of the Motion for Rehearing is . . . April 9, 2012,” and added that, “[t]he time to either file a motion for rehearing or a petition for review of the Court’s dismissal of the Petition has now passed. The Court will not grant an extension of either of those deadlines.” *See* Ariz. R. Crim. P. 32.9(c) (petition for review must be

¹On March 5, 2012, Morales’s attorney supplemented this pleading, pointing out, inter alia, that his client was unhappy his attorney had not filed a reply to the state’s response to the petition for post-conviction relief.

filed within thirty days of trial court's ruling on post-conviction relief or motion for rehearing). This petition for review followed.²

¶4 On review, Morales raises many of the arguments he raised in his petition for post-conviction relief. In summary, he argues the trial court violated his constitutional rights by allowing the state to introduce evidence that he had refused to submit to field sobriety tests and a breathalyzer test; erred in instructing the jury it could consider evidence of his refusal to submit to these tests; and, also asserted he is eligible for probation. He also argues A.R.S. § 28-1388(D) is unconstitutional. Morales asserts he is entitled to a new trial on the constitutional claims, and alternatively, to be resentenced.

¶5 However, as the trial court correctly noted in its April 4, 2012 ruling, Morales's motion for rehearing was both untimely, and "failed to set forth any grounds [entitling him] to relief." Morales does not contest either of these conclusions on review or claim the court otherwise erred in denying the motion for rehearing. Therefore, because the motion for rehearing was filed untimely, a finding Morales has not challenged on review, that untimely filing did not extend the time to file a petition for review from the court's denial of post-conviction relief. Allowing an untimely motion for rehearing to revive Morales's ability to obtain review of the court's denial of the original petition for post-conviction relief would render meaningless the thirty-day

²Although the trial court did not extend the time for filing a petition for review from its dismissal of the petition for post-conviction relief, by extending the time to file a petition for review from its denial of the motion for rehearing, the court essentially permitted Morales to file the petition for review now before us. *See* Ariz. R. Crim. P. 32.9(c).

deadline for filing a petition for review. Moreover, the court did not grant Morales leave to file a delayed petition for review from its denial of his petition for post-conviction relief. And Morales does not claim he was granted such leave or that the court erred by denying him leave.

¶6 Accordingly, review is denied.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge